

UNITED STATES OF AMERICA  
SMALL BUSINESS ADMINISTRATION  
OFFICE OF HEARINGS AND APPEALS  
WASHINGTON, D.C.

SIZE APPEAL OF:

Lance Bailey & Associates, Inc.

Appellant

Re: Global McKissack Partners, LLC

Solicitation No. DOL051RP20038

Department of Labor

## Division of Contract Services

Washington, DC 20210

## APPEARANCES

Lance O. Bailey, Lance Bailey & Associates, Silver Spring, Maryland.

Kenneth B. Weckstein, Esq., Epstein Becker & Green, P.C., Washington, D.C., for Lance Bailey & Associates.

Grace Bateman, Esq., Seyfarth Shaw LLP, Washington, D.C., Counsel for Global McKissack Partners, LLC.

# DIGEST

Two firms approved by the SBA to be a mentor and protégé under 13 C.F.R. § 124.520 may joint venture as a small business for any federal government procurement. When the two firms create the joint venture, the joint venture becomes exempt from the normal rules of affiliation under 13 C.F.R. § 121.103(h)(3). The exception to affiliation is valid so long as the protégé concern qualifies as small for the size standard applicable to the contract and the joint venture agreement meets applicable regulatory requirements.

The joint venture agreement for performance of an 8(a) contract must designate the 8(a) participant as the managing venture and the program manager must be a current employee of the 8(a) participant. If a joint venture agreement does not meet these regulatory requirements, it is deficient and the joint venture is not entitled to the affiliation exception for mentor-protégé joint ventures under 13 C.F.R. § 121.103(h)(3)(iii).

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## DECISION

PENDER, Administrative Judge:

### Jurisdiction

This appeal arises from a April 5, 2006 size determination (2-2006-30) finding Global McKissack Partners, LLC, to be a small business. Lance Bailey & Associates as Protestor and interested party, has appealed this size determination. The U.S. Small Business Administration Office of Hearings and Appeals ("this Office") decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

### Issue

Whether the Area Office made a clear error of fact or law when it determined GMP to be a small business.

### Facts

The Record establishes the following facts by the preponderance of the evidence:

1. The U.S. Department of Labor, Employment Training Administration ("DOL") Contracting Officer ("CO") posted a Pre-Solicitation Notice for Solicitation No. DOL051RP20038 ("solicitation") on the FEDBIZOPPS website on March 23, 2005. The Synopsis identified North American Industry Classification System ("NAICS") code 541310, Architectural Services, with a \$4 million size standard as being applicable. The notice stated the acquisition was a 100% Small Business Set-Aside for Certified 8(a) Business Enterprises Acquisition.
2. On November 15, 2005, DOL initially determined that TKC Technology Solutions, LLC ("TKC") met the eligibility requirements and was selected for award. On November 16, 2005, an unsuccessful offeror, Lance Bailey & Associates, Inc. ("Appellant"), filed a protest with the CO. As a result of this protest, the Area 2 Office of Government Contracting, U.S. Small Business Administration ("Area Office") found TKC other than a small concern.
3. On December 21, 2005, DOL selected the next eligible offeror, Global McKissack Partners, LLC ("GMP"), for the award. DOL provided Appellant with notice of its intent to negotiate an Architect/Engineer Contract with GMP on December 23, 2005.
4. Sheryl Black and Harry Black are husband and wife. Sheryl Black is the 100% stockholder, President and sole director of Global Commerce Solutions, Inc. ("Global"). Global is a small concern with annual receipts below \$4 million. It is an approved 8(a) firm.

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5. Deryl McKissack is the 100% stockholder, President, and director of McKissack & McKissack of Washington, Inc. ("M&M"). Sam Condit is also a director and Harry Black had the title of Vice President (VP) of M&M but had no management authority when he worked for M&M. Harry Black no longer works for M&M but is now employed by the City of Richmond, Virginia.

6. M&M is an other than small concern for NAICS code 541310, *i.e.*, in its January 31, 2006 Response to Appellant's protest, GMP admitted M&M has annual receipts "exceeding \$24 million."

7. On July 28, 2004, the U.S. Small Business Administration, Washington District Office ("District Office") approved the mentor-protégé agreement between Global and M&M. On June 14, 2005, the District Office approved the joint venture ("JV") agreement between Global and M&M establishing GMP to pursue the RFP.

8. Sheryl Black is a 51% member and managing director of GMP. Deryl McKissack is a 49% member and director of GMP. Harry Black is also a director of GMP.

9. The May 12, 2005 GMP JV Agreement states that Mr. Craig Gardner has been selected as Program Manager and will serve as an employee of Global (Paragraph 2.0). However, there is nothing in the JV Agreement establishing Global as the managing venture of the JV between Global and M&M.

10. GMP's proposal contains Resumes of Key Personnel (various SF 330s). GMP designated Mr. Craig Gardner to be the Program Manager for the contract. Mr. Gardner is an employee of M&M (he is listed as such on the SF 330 and on M&M's website) with significant experience in design and construction management.

11. On December 29, 2005, Appellant filed a protest with the CO. Appellant alleged:

a. GMP is not eligible for award since it is a JV between Global and M&M, a large business concern, and therefore does not qualify as an 8(a) firm;

b. GMP could not receive award of an 8(a) contract, even if it had a mentor-protégé agreement, because the agreement did not meet the requirements of 13 C.F.R. § 124.513(c)(2). Specifically, the Program Manager for the contract is not a Global employee and Global's experience is not in architect/engineer or construction management, *i.e.*, Global does not hold itself out as offering services that fall under the NAICS code designated in the RFP. (Appellant was unaware of any mentor-protégé agreement and also alleged Global had another agreement with another firm.);

c. Global is affiliated with M&M because of an identity of interest between Harry Black and Sheryl Black, who are husband and wife; and

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d. GMP is a newly organized concern and thus ineligible under the newly organized concern rule.

12. GMP responded to Appellant's Protest on January 31, 2006. GMP stated:

a. There was no identity of interest between Harry and Sheryl Black, but rather a fracture;

b. Harry Black was not a key employee of M&M and thus there could be not be a violation of the newly organized concern rule;

c. The SBA approved the mentor-protégé agreement between Global and M&M on July 28, 2004; and

d. The SBA approved the JV Agreement forming GMP on June 14, 2005. GMP stated, "Global would employ Craig Gardner as Project Manager for the DOL project." (Protest Reply, page 6). GMP alleges there cannot be any affiliation between Global and M&M because of the approved mentor-protégé and JV agreements. However, GMP did not respond to the specific protest allegations Appellant made concerning 13 C.F.R. § 124.513(c)(2).

### Size Determination and Appeal

#### A. The Size Determination

On April 5, 2006, the Area Office issued Size Determination No. 2-2006-30 ("size determination") finding GMP to be a small business under NAICS code 541310, Architectural Services.

#### 1. The Area Office's Factual Findings

The Area Office's size determination found the following:

a. Sheryl Black is a 51% member and Deryl McKissack is a 49% member of GMP, while Sheryl Black will be the Director of GMP;

b. Sheryl Black owns 100% of Global and Deryl McKissack owns 100% of M&M. Global and M&M are separate entities and neither can control the other;

c. Global's revenues are below the size standard and M&M's are above the size standard;

d. Global and M&M have an approved mentor-protégé agreement and a JV Agreement approved by the District Office; and

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e. Mr. Black is not a key employee of M&M and has no ability or power to control M&M. He was originally hired by M&M as an independent consultant and his role as Vice-President was in name only.

## 2. The Mentor-Protégé and JV Agreement Issue

The Area Office pointed out that an 8(a) participant cannot be deemed an affiliate of its large mentor firm solely because the protégé receives assistance from the mentor under 13 C.F.R. § 121.103(h)(3)(iii). Next, the Area Office pointed out that affiliation cannot be found based upon the approval of a proper joint venture agreement between an approved mentor-protégé. The Area Office concluded that since there was an approved mentor-protégé agreement and the District Office had approved the JV Agreement, it could not base a finding of affiliation upon the JV Agreement. In making the finding, the Area Office did not analyze whether the JV Agreement was proper under 13 C.F.R. § 124.513(c)(2), an issue Appellant specifically raised in its Protest (Page 8).

## 3. Affiliation Based Upon the Relationship Between Harry and Sheryl Black

The Area Office analyzed general issues of control and affiliation with regard to husband and wife Harry and Sheryl Black. The Area Office noted the issue to be decided was the effect of their relationship with regard to a finding of affiliation among GMP, Global, and M&M.

The Area Office found there was a fracture between Sheryl and Harry Black because Mr. Black had no power to control or ownership interest in either M&M or Global.

Next, the Area Office addressed the ostensible subcontractor issue the protestor raised under 13 C.F.R. § 121.103(h)(4). The Area Office found this rule did not apply because Mr. Black was not a stockholder, director, or key employee of Global.

## 4. Area Office Determination

The Area Office determined Global and M&M were not affiliated. Therefore, it found GMP is a small business under the \$4 million average annual receipts size standard for NAICS code 541310, Architectural Services.

## B. The Appeal

Appellant received the size determination on April 7, 2006. Appellant filed its appeal of the size determination on April 24, 2006. Because the fifteenth day after Appellant's receipt of the size determination was a Saturday, the fifteenth day after Appellant's receipt of the size determination would be April 24, 2006.

Although not possessing the Record before the Area Office, Appellant alleged the Area Office made clear errors of law and fact, including:

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a. Finding GMP had rebutted the presumption that family members have identical interests and must be treated as one person and in finding a clear fracture between Harry and Sheryl Black. Appellant emphasized Global's complete lack of experience in the NAICS code applicable to the RFP unless Mr. Black was part of its effort. Appellant also averred Mr. Black controlled Global, even though his wife nominally owned Global. Finally, Appellant urged that Harry and Sheryl Black were not estranged and thus there was no fracture; and

b. Continuing the argument made in its Protest, Appellant argued the approved mentor-protégé and JV agreements did not preclude affiliation. Among other things, Appellant argued Global was not an architectural firm and thus M&M really was not mentoring it. Appellant also argued that Global is not even authorized to practice architecture in Virginia, "the primary place of performance of this contract."

As it did in its Protest, Appellant argued Global could not qualify under 13 C.F.R. § 124.520 to be part of a mentor-protégé agreement or be able to comply with 13 C.F.R. § 124.513(c)'s joint venture requirements, *i.e.*, given its lack of experience in architecture, one of Global's employees could not be the Program Manager.

### C. Response to Appeal Petition

GMP filed a timely Response to the Appeal Petition. In its Response, it supported the Area Office's size determination. GMP's overarching argument was that since only Deryl McKissack controls or owns M&M, there can be no affiliation between it and Global.

GMP argued there was a clear fracture between Harry and Sheryl Black. GMP echoed the Area Office's finding that since Mr. Black had no power to control either Global or M&M, there was a fracture.

GMP also averred that whether Harry and Sheryl Black are affiliated is irrelevant to finding affiliation among Global, GMP, and M&M. GMP repeated its point that since Mr. Black did not have the power to control either M&M or Global, his relationship with his wife is irrelevant.

GMP also disagreed with Appellant's assertion that the approved JV and mentor-protégé agreements did not preclude a finding of affiliation between Global and M&M. GMP pointed out that assistance to a protégé did not establish affiliation with the mentor. GMP argued that the Area Office considered the mentor-protégé relationship between Global and M&M and concluded there was no affiliation. As with its Protest Reply, GMP did not address the issue of whether the JV Agreement complied with 13 C.F.R. § 124.513(c)(2).

GMP also disputed Appellant's arguments concerning Global's ability to provide architect/engineer services. GMP argued the laws quoted by Appellant were inapplicable and that jurisdictions license individuals, not firms.

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## Discussion

### A. Timeliness

Appellant received notice that GMP had been selected for negotiations (tantamount to being named the successful offeror for Architect/Engineer procurements) on December 23, 2005 (Fact 3). Appellant protested on December 29, 2005 (Fact 11), within five days, excluding the two weekend days and the one legal holiday between December 23, 2005 and December 29, 2005. Thus, the underlying protest was timely. *See* 13 C.F.R. § 121.1004(a).

As noted above, Appellant appealed the Area Office's April 5, 2006 size determination within 15 days of receiving it. Therefore, its appeal is timely. 13 C.F.R. § 134.304(a)(1).

### B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, this Office does not consider Appellant's size *de novo*. Rather, we (this Office) review the record to determine whether the Area Office based its size determination upon a clear error of fact or law. (*See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard or review.) Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

### C. The Merits

#### 1. Introduction

As explained above, I cannot find a clear error of fact or law merely because of a disagreement with the Area Office's decision. Rather, there must be a definite and firm conviction of an error. In this appeal, I have a definite and firm conviction that the Area Office made a clear error of fact and law. That is, I find the Area Office did not correctly apply 13 C.F.R. § 124.513(c)(2) to the JV Agreement in the Record. Had it done so, it would have had to find, as Appellant urged it in its protest (Fact 11), that the JV Agreement and GMP's Proposal were in violation of that regulation. Therefore, GMP's violation of 13 C.F.R. § 124.513(c)(2) negates the exception to affiliation for 8(a) mentor-protégé joint ventures permitted by 13 C.F.R. § 121.103(h)(3)(iii).

I note GMP did not address Appellant's specific protest allegation concerning 13 C.F.R. § 124.513(c)(2) (Fact 12). Nor did the Area Office address the adequacy of the JV Agreement in the size determination. Since Appellant clearly did not abandon<sup>1</sup> or waive its argument upon

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<sup>1</sup> *See* 13 C.F.R. § 134.316(a).

Appeal (Appeal Petition, page 5), this Office must rule upon the issue. We could simply remand the size determination since it failed to address matters raised in the protest below. *See Size Appeal of Dawson Building Contractors, Inc.*, SBA No. SIZ-4501 (2002). However, since the JV Agreement in this case is patently deficient, a remand by this Office would serve no useful purpose.

Because the exception permitted by 13 C.F.R. § 121.103(h)(3)(iii) is inapplicable, it is not necessary to rule on any question of affiliation raised by the relationship between Harry and Sheryl Black or the question of a newly organized concern. The deficient JV Agreement establishing GMP creates an affiliation between Global and M&M. Since Global and M&M, in the aggregate, have revenues exceeding the \$4 million size standard, GMP is other than small for this RFP. *See* 13 C.F.R. § 121.104(d).

## 2. Principles of Law

### a. Applicable Standard

As described above, it must be determined whether the Area Office made a clear error of law or fact. 13 C.F.R. § 134.314. This analysis is bounded by 13 C.F.R. § 121.103(a)(5)'s requirement that the Area Office consider the totality of the circumstances to determine whether affiliation exists. This means an evaluation of whether the Area Office: (1) properly considered available and relevant facts; (2) evaluated the arguments of the parties; and (3) correctly applied the regulations and law to the relevant facts in making its size determination.

### b. Affiliation

The issue of affiliation in this appeal arises from the existence of an actual joint venture (13 C.F.R. § 121.103(h)). This makes the size of the members of the venture relevant because the receipts of both firms are aggregated for the purpose of determining the size of the joint venture. 13 C.F.R. § 121.104(d).

### c. The Effect of a Qualifying Mentor-Protégé Agreement

Two firms approved by the SBA to be a mentor and protégé under 13 C.F.R. § 124.520 may joint venture as a small business for any Federal Government Procurement. When the two firms create a joint venture, the joint venture becomes exempt from the normal rules of affiliation. 13 C.F.R. § 121.103(h)(3). The exemption is valid as long as the protégé concern qualifies as small for the size standard applicable to the contract and the joint venture meets other regulatory requirements. 13 C.F.R. §§ 124.513(b)(3), 124.513(c).

The requirements of 13 C.F.R. § 124.513(c) are mandatory. Among other things, the joint venture agreement for performance of an 8(a) contract must leave control of the contract with the 8(a) participant (be the managing venture) and the program manager must be an employee of the 8(a) participant. 13 C.F.R. § 124.513(c)(2).



### 3. Analysis of the Merits of the Size Determination

Did the Area Office commit a clear error of fact or law  
in finding Appellant is a small business?

#### a. Global and M&M are Affiliated With One Another

Global and M&M formed GMP as a joint venture to pursue the RFP (Fact 12).<sup>2</sup> Under 13 C.F.R. § 121.103(h), this JV makes Global and M&M affiliated.

Because Global and M&M are affiliated, their receipts are to be aggregated for determining the size of their joint venture. 13 C.F.R. § 121.104(d). Global is a small 8(a) concern (Fact 4) while M&M is a large concern (Fact 6). This means that since M&M is other than small, the joint venture is also other than small. Hence, unless GMP qualifies for an exception, it is ineligible to submit an offer for the RFP because the RFP is a 100% Small Business Set-Aside for 8(a) concerns (Fact 1).

#### b. GMP is Not Exempt from Affiliation Rules

Global is an approved 8(a) concern that entered into an approved mentor-protégé agreement with M&M (a large concern) and subsequently formed GMP under a JV Agreement with M&M (Facts 4, 6, 7, 8, and 9). *See* 13 C.F.R. §§ 121.103(h)(3)(iii), 124.513(b)(3), and 124.520. Provided the Global/M&M joint venture (GMP) agreement meets the requirements of 13 C.F.R. § 124.513(c), GMP would be exempt from normal affiliation rules.

However, the GMP JV Agreement violates the requirements of 13 C.F.R. § 124.513(c) because it does not designate: (1) An employee of the managing venture (the 8(a) contractor) as Program Manager for the contract; or (2) Global as the managing venture of the joint venture. Instead, the JV Agreement states, consistent with a SF 330 GMP provided in its Proposal, that "Mr. Craig Gardner has been selected as Program Manager" and "*will* serve" as an employee of Global (May 12, 2005 JV Agreement, paragraph 2.0) (emphasis added). Later in the same paragraph, it names Ms. Black as the Managing Director, without naming Global as the Managing Venture. Since Appellant raised these issues in its Protest (Fact 11), the Area Office should have: (1) Addressed the adequacy of the JV Agreement; and (2) Looked at GMP's Proposal to determine who employed Mr. Gardner. Had the Area Office looked at GMP's Proposal, it would have determined Mr. Gardner is a present employee of M&M. Had it looked

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<sup>2</sup> GMP provided a JV Agreement dated April 15, 2005, with its Response to the Appeal Petition. It indicated GMP was created to pursue more than the RFP and named Global as the Managing Venture. However, the May 12, 2005 JV Agreement GMP provided with its response to the Appeal Petition, which is part of the record, indicated the JV was only for the RFP. We presume the May 12, 2005 JV Agreement supersedes the April 15, 2005 agreement. Regardless, the April 15, 2005 JV Agreement is neither significant to the decision nor part of the Record.

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at the terms of the JV Agreement it also would also have found it did not name a managing venture, although it did name the owner of the 8(a) concern as the managing director.

Global is not an Architect/Engineer firm. Considering this lack of experience with the architect-engineer work applicable to the RFP's NAICS code, the arrangement between Global and M&M for this RFP violates the spirit and intent of 13 C.F.R. § 124.513(a)(2). In examining the Proposal in the Record, it appears Global is bringing very little to the joint venture other than its 8(a) status. When this is considered in light of the violation of 13 C.F.R. § 124.513(c)(2)'s requirement that the Program Manager be an employee of Global, there is no doubt that the JV should not have been approved for this procurement. Because the May 12, 2005 JV Agreement stated Mr. Gardner "has been selected as the Program Manager for this contract" and "will serve" as an employee of Global, the Area Office should have considered whether he was a current Global employee. Additionally, the Area Office was obligated to note that GMP provided a SF 330 that named Mr. Gardner as Program Manager and stated that he was a current M&M employee. Regardless, since the JV agreement between Global and M&M does not name a current Global employee as Program Manager, it is deficient and the Global/M&M affiliation is not exempt from the affiliation rules of 13 C.F.R. § 121.103(h)(2).

c. The Area Office was Obligated to Decide Whether the JV Agreement was Sufficient

The entire purpose of the size protest process is to ensure that when business size status is required or advantageous for award of a Federal Procurement Contract, only concerns that do not exceed the size standard for the NAICS code designated in the solicitation can be awarded the contract. *See* 13 C.F.R. §§ 121.101(a), 121.401, 121.403, and 121.1001. Once a protestor files a formal size protest, Area Offices become responsible for making a formal size determination in response to the protest. 13 C.F.R. § 121.1002.

Without having access to GMP's proposal, Appellant filed a detailed and specific protest. Among other matters, Appellant alleged a valid mentor-protégé agreement could not exist because the conditions in 13 C.F.R. § 124.513(c)(2) would not be met. Appellant alleged an employee of the protégé could not be the Program Manager, because Global did "not even hold itself out as offering services that fall under [the] NAICS code for this procurement." (Protest at page 8). Appellant's logic proved to be correct, for the GMP JV Agreement states Mr. Gardner (a current M&M employee) will serve as Project Manager (Facts 9 and 10).

In its size determination, the Area Office failed to respond to Appellant's allegations under 13 C.F.R. § 124.513(c)(2). Instead, it concluded that because the District Office approved the mentor-protégé and JV agreements before GMP submitted its offer, the agreements do not result in a finding of affiliation among GMP, Global, and M&M. (Size Determination, page 7).

The Area Office's treatment of Appellant's 13 C.F.R. § 124.513(c)(2) allegations:  
(1) Denied recourse to Appellant; (2) Avoided its inherent duty to determine size; and  
(3) Countenanced a clear violation of 13 C.F.R. § 124.513(c)(2). Clearly, the Area Office had access to GMP's Proposal and JV Agreement. Hence, it was in a position to respond

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substantively to the Protest and was obligated to do so by 13 C.F.R. § 121.1002 because Appellant was entitled to have it determine GMP's size, which it could not reasonably accomplish without determining if there was a proper exception under 13 C.F.R. § 121.103(h)(3)(iii) and 13 C.F.R. § 124.513(c)(2).

In summary, Appellant was entitled to have the Area Office determine GMP's size. To accomplish this duty the Area Office had to determine if GMP's claimed exception to affiliation was proper. Otherwise, Appellant would be without a remedy to challenge matters relevant to the size of the protested concern.

### Conclusion

I have considered Appellant's Petition in light of the Record. The Record shows the Area Office did not consider Appellant's protest allegation that the JV Agreement did not comply with 13 C.F.R. § 124.513(c)(2). Instead, the Area Office failed to address the issue and concluded that since GMP submitted the JV Agreement to the District Office, the District Office's approval meant it did not have to consider the issue. Failing to address this specific protest issue was a clear error of law because: (1) Appellant had no other place to address the issue; (2) The Area Office was obligated to determine GMP's size; and (3) Addressing the protest issue was a predicate to determine GMP's size. Since the JV Agreement between Global and M&M does not name a Global employee as Project Manager or Global as the Managing Venture, it is deficient and not exempt from the affiliation rules. Because Global and M&M, in the aggregate, have revenues exceeding the size standard, GMP is other than a small concern for the purpose of the RFP.

Appellant's Appeal is SUSTAINED. Size Determination 2-2006-30 is REVERSED. GMP is other than a small concern for this RFP.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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THOMAS B. PENDER  
Administrative Judge